PREFILED TESTIMONY

OF

BARBARA MALLETT

PUD 200300646

(Track 3b – Dedicated Transport)

Application of Joyce E. Davidson, Director of the Public Utilities Division, Oklahoma Corporation Commission, to Initiate a Proceeding for the Implementation of the Federal Communications Commission's Triennial Review Order

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Q: Please state your name and business address.

A: My name is Barbara L. Mallett. My business address is the Jim Thorpe Office Building, Room 500, Oklahoma City, OK.

Q: Where are you employed and in what capacity?

A: I am employed by the Public Utility Division ("Staff") of the Oklahoma Corporation Commission ("OCC" or "Commission") as a Public Utility Regulatory Analyst.

Q: Have you testified previously before the Commission?

A: Yes, I have.

Q: Have your credentials been accepted by the Commission?

A: Yes.

Q: What is the purpose of Staff's testimony?

A: The purpose of this testimony is to make a recommendation on behalf of Staff in response to the Application filed by Joyce E. Davidson opening a proceeding to implement the Federal

Communication Commission's ("FCC's") Triennial Review Report ("TRO"). Specifically, this testimony will address Staff's findings with regard to Track 3b – Dedicated Transport.

Q: What is your recommendation in this Cause?

A: Staff recommends that this Commission find that no dedicated transport routes in Oklahoma currently meet the triggers set by the FCC.

Q: What steps did Staff take to obtain information on which to base this recommendation?

A: Staff provided a data request to Southwestern Bell Telephone, LP d/b/a SBC Oklahoma ("SBC") asking for identification of routes that SBC believes fulfills the FCC's triggers. Staff used this approach because the TRO requires that both ends of a "dedicated transport route" end in a collocation or similar arrangement in an ILEC central office. Therefore, because SBC is a reasonable source of information regarding what CLECs are collocated in its central offices, it is in a position to propose CLEC routes that might meet one or more of the FCC's triggers. Next, Staff developed and provided a second and more detailed data request to SBC and the three competitive local exchange carriers ("CLECs") that SBC identified as possibly having deployed dedicated transport routes meeting the FCC's definition in the TRO. In both of these data requests, Staff asked for any and all information regarding routes, or the potential for a carrier to establish a route, that might fulfill one of the FCC's triggers. In addition, Staff studied the testimony filed by the Parties to this Cause and contacted several of the companies by telephone to ask that they confirm or clarify their responses to Staff's data request or provide additional information regarding whether or not any of the FCC's triggers are met in Oklahoma.

Q: Who were the three CLECs that SBC identified as potentially having met at least one of the FCC's triggers?

A: They were Cox Oklahoma Telcom, LLC ("Cox"), MCImetro Access Transmission Services, Inc. ("MCI") and Xspedius Management Company, LLC ("Xspedius").

Q: What were the FCC's impairment findings?

A: As stated in paragraph 359 of the TRO, the FCC found impairment as follows:

- OCn Transport – no impairment without access to unbundled OCn transport facilities.
- Dark Fiber Transport – impairment without access to unbundled dark fiber transport facilities, subject to both a granular route-based review by the states to identify available wholesale facilities and to identify where transport facilities can be deployed.
- DS3 Transport – impairment without access to unbundled DS3 transport facilities, subject to both a granular route-based review by the states to identify available wholesale facilities and to identify where transport facilities can be deployed.
- DS1 Transport – impairment without access to unbundled DS3 transport facilities, subject to both a granular route-based review by the states to identify available wholesale facilities and to identify where transport facilities can be deployed.

Q: What are each of these types of facilities?

A: I will briefly explain each. A DS0 is the smallest capacity circuit – one voice/data line. DS0 facilities are not included in the analyses required under the TRO. A DS1 facility consists of twenty-four DS0 circuits bundled together. A DS3 facility is made up of twenty-eight DS1s (or 672 DS0s). Dark fiber is fiber optic cable deployed by a carrier that has not been activated through connections to optronics that light it and thereby render it capable of carrying communications.

Q: Please explain the nature of the FCC's triggers.

A: The first trigger ("the self-deployment trigger") is designed to identify routes along which the ability to self-provide transport facilities is evident based on the existence of several competitive transport facilities. Specifically, where three or more competing carriers, not affiliated with each other or the incumbent LEC, each have deployed non-ILEC transport facilities along a specific route, regardless of whether these carriers make transport available to other carriers, the FCC found that to be sufficient evidence that competing carriers are capable of self-deploying. In paragraph 409 of the TRO, the FCC stated that this trigger should not apply at the DS1 level.

The second trigger ("the wholesale trigger") is designed to identify where competitive wholesale alternatives are available. Specifically, the FCC found that competing carriers are not impaired where they have available two or more alternative transport providers, not affiliated with each other or the incumbent LEC, immediately capable and willing to provide transport at a specific capacity along a given route between ILEC switches or wire centers.

The third trigger ("the potential route trigger") is explained in paragraph 410 of the TRO.

> … when conducting its analysis, a state must consider and may also find no impairment on a particular route that it finds is suitable for "multiple, competitive supply," but along which this trigger is not facially satisfied. States must expressly base any such decision on the following economic characteristics:
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> - local engineering costs of building and utilizing transmission facilities;
> - the cost of underground or aerial laying of fiber;
> - the cost of equipment needed for transmission;
> - installation and other necessary costs involved in setting up service;
> - local topography such as hills and rivers;
> - availability of reasonable access to rights-of-way;
> - the availability or feasibility of alternative transmission technologies with similar quality and reliability;
> - customer density or addressable market; and
> - existing facilities-based competition.

Q: If one or more of the FCC's triggers are met, must the state commission return a finding of no impairment on that specific route?

A: Paragraph 411 of the TRO allows state commissions latitude in that finding. The FCC stated:

> In other instances, by contrast, states may identify impairment on specific routes that facially satisfy the self-provisioning trigger, but where some significant barrier to entry exists such that deploying additional facilities is entirely foreclosed.

Q: What is the result of a state commission finding of no impairment along a specific route?

A: If a state commission finds no impairment for a specific capacity of transport on a route, the incumbent LEC will no longer be required to unbundle transport along that route, according to the transition schedule adopted by the state commission.

Q: What were Staff's findings?

A: In his testimony, Gary Smith identified three routes that he believes fulfill the FCC's self-deployment trigger and seven routes that he believes meet the FCC's wholesale trigger. Staff investigated each of these routes, as well as all other routes reported by SBC and by the CLECs identified by SBC as having self-deployed dedicated transport routes in their responses to Staff's data requests. Staff does not believe that any routes in Oklahoma meet any of the FCC's three triggers at this time.

Q. Do you have any concerns with the way that SBC conducted its impairment analysis?

A. Yes. Staff noted that SBC appears to have employed an analytical method that focuses on the presence or absence of fiber-based collocation. In paragraph 397 of the TRO, the FCC rejected approaches that do not take into account other factors because they are "not sufficiently tailored to identify where requesting carriers are not impaired without unbundled transport." The specific text follows.

> … this test provides little indication that competitors have self-deployed alternative facilities, or are not impaired outside of a few highly concentrated wire centers. Additionally, the pricing flexibility trigger based on alternative transport-based collocation requires no consideration of the ubiquity of the competitive transport facilities throughout an MSA. The measure does not indicate that the competitive fiber facilities connect to collocations in any other incumbent LEC central offices. The measure may only indicate that numerous carriers have provisioned fiber from their switch to a single collocation rather than indicating that transport has been provisioned to transport traffic between incumbent LEC central offices.

The FCC required an analysis that looked at more than the existence of fiber-fed collocations. Instead, the FCC required evidence "indicating that transport has been provisioned to transport traffic between incumbent LEC central offices." Staff believes that SBC's analysis is faulty in that it fails to provide specific evidence that transport has been provisioned between the two SBC central offices.

Q: Did Staff note any other possible flaws in SBC's analysis?

A: Yes. Specifically, in regard to the wholesale trigger, SBC did not provide any evidence to support the requirements of "operationally ready" or "willing immediately to provide" service on the routes it identified. Instead, SBC relied upon statements contained on websites.

Q: Was Staff able to verify that any dedicated transport routes are available on a wholesale basis as required by the FCC in the TRO to meet the wholesale trigger?

A: No. In the course of Staff's analysis, Staff contacted the three companies whose routes might meet either the self-provisioning trigger or the wholesale trigger. A representative of Xspedius stated: ***** START OF CONFIDENTIAL INFORMATION *****

[redacted]

***** END OF CONFIDENTIAL INFORMATION *****

Based on Cox's revised response to Staff's data request, it is Staff's opinion that Cox's routes should not be considered as dedicated transport routes or wholesale dedicated transport routes under the TRO either. ***** START OF CONFIDENTIAL INFORMATION ***** [redacted] ***** END OF CONFIDENTIAL INFORMATION ***** As such, under the TRO, these facilities are not inherently a part of the incumbent LEC's local network and should not be used to define a dedicated transport route or wholesale dedicated transport route. This issue will be discussed more fully below.

Last, in his testimony on behalf of MCI Metro Access Transmission Services and others, Mr. Gary J. Ball stated that CLECs typically use "fiber rings [to] connect aggregation points, such as collocation arrangements, and major customer sites to the carrier's switching or hub site. The collocation arrangements are typically used to aggregate unbundled loops as opposed to providing transport hubs." Further, addressing his remarks to all of the SBC-proposed dedicated transport routes, Mr. Ball stated that "no routes meet the self-provisioning trigger for dedicated transport at either the DS3 or dark fiber capacity levels." Finally, Mr. Ball stated that "none of the dedicated transport routes listed by SBC meet the wholesale trigger." Staff asserts that since Mr. Ball was speaking on behalf of MCI, his comments indicate that none of MCI's routes should be considered as satisfying either the self-deployment or wholesale triggers.

At a minimum, however, until evidence is presented indicating that the FCC's "operationally ready" or "willing immediately to provide" criteria have been met for routes that have been deployed for the purpose of dedicated transport, this Commission should not find that any proposed route in Oklahoma meets either the FCC's wholesale trigger or its self-deployment trigger.

Q: Setting aside concerns with SBC's methodology, which routes and carriers did SBC's witness, Mr. Smith, identify?

A: That is most easily answered by reference to the table shown in Attachment A. That table provides the start and end points (Common Language Location Identifier codes or "CLLI" codes) of each route and the providers that have deployed facilities on it.

Q: Previously you mentioned that Staff recommends that this Commission find that no dedicated transport routes meet the triggers set by the FCC in Oklahoma at this time. What is the nature of the difference of opinion between Staff and SBC's witness?

A: The fundamental difference of opinion between Staff and SBC is founded in Staff's unwillingness, like the FCC, to concede that the existence of fiber-fed collocations in two ILEC central offices necessarily implies that there is competitive provisioning of dedicated transport between those central offices. Instead, Staff sought to investigate the nature of the fiber actually deployed.

Q. Please elaborate.

A. In the Triennial Review Order, the FCC revised its previous definition of dedicated transport. Specifically, at paragraph 365 of the TRO the FCC states that:

> We limit our definition of dedicated transport under section 251(c)(3) to those transmission facilities connecting incumbent LEC switches and wire centers within a LATA. . . . [W]e find that the Act does not require incumbent LECs to unbundle transmission facilities connecting incumbent LEC networks to competitive LEC networks for the purpose of backhauling traffic.

At paragraph 366, the FCC further refines its new definition:

> We find that a more reasonable and narrowly-tailored definition of the dedicated transport network element includes only those transmission facilities *within* an incumbent LEC's transport network, that is, the transmission facilities between incumbent LEC switches. Because the Act does not provide guidance on which transmission facilities should be included in the definition of the transport network element, we believe we have discretion to adopt a definition that is in keeping with the section 251's goal of opening the incumbent LEC's local network to competition. We find that transmission facilities connecting incumbent LEC switches and wire centers are an inherent part of the incumbent LEC's local network Congress intended to make available to competitors under section 251(c)(3). On the other hand, we find that transmission links that simply connect a competing carrier's network to the incumbent LEC's network are not inherently a part of the incumbent LEC's local network. Rather, they are transmission facilities that exist *outside* the incumbent LEC's local network. Accordingly, such transmission facilities are not appropriately included in the definition of dedicated transport. […] Therefore, we find that the dedicated transport

> network element includes only those "features, functions, and capabilities" of equipment and facilities that coincide with the incumbent LEC's transport network – the transmission links connecting incumbent LEC switches or wire centers.

At paragraph 367 of the TRO, the FCC states:

> … These backhaul facilities from incumbent LEC networks to competitors' networks are distinguished from other transport facilities because competing carriers have some control over the location of their network facilities that is lacking with regard to transport as we define it here. Competing carriers control, in part, how they design and locate their networks, as opposed to obtaining a connection between two incumbent LEC wire centers. For instance, a competing carrier can choose to locate its switch very close to an incumbent LEC wire center to minimize costs associated with deploying fiber over longer distances. Similarly, a competing carrier can choose to locate its network equipment, such as its switch, near other competing carriers to share costs, or near existing competitive fiber providers that have already deployed competitive transport facilities. Competing carriers have no such choice in seeking to obtain transport within the network of incumbent LECs. We also note that transmission facilities used for backhaul from an incumbent LEC office to a competitive LEC network often represents the point of greatest aggregation of traffic in a competing carrier's network, and such carriers are more likely to self-deploy these facilities because of the cost savings such aggregation permits. More, we find that our more limited definition of transport is consistent with the Act because it encourages competing carriers to incorporate those costs within their control into their network deployment strategies rather than to rely exclusively on the incumbent LEC's network.

Finally, at paragraph 401 of the TRO, the FCC states:

> … We define a route, for purposes of these tests, as a connection between wire center or switch "A" and wire center or switch "Z". Even if, <u>on the incumbent LEC's network</u>, a transport circuit from "A" to "Z" passes through an intermediate wire center "X," the competitive providers must offer service connecting wire centers "A" and "Z," but do not have to mirror the network path of the incumbent LEC through wire center "X." (emphasis added)

Q: Would you please explain the relevance of these passages to Staff's decision that some of the transport routes should not be considered in its findings in this cause?

A: Yes. Based upon the information that Staff was provided by the CLECs identified as trigger companies, Staff has determined that while these CLECs have fiber-fed collocations, none of these providers have deployed fiber to carry traffic between two SBC central offices. Instead, these providers have channelized their facilities in such a way that traffic is carried directly from the central office collocation to the CLEC switch (entrance facilities) and not to another SBC central office (dedicated transport). Using the clarification provided by paragraph 401, it appears that the intermediate point "X" is a part of the CLEC's network and does not lie within the ILEC's network as the FCC required in the TRO. Therefore, it is Staff's opinion that the routes of these CLECs should not be considered in these analyses.

Q: Did Staff address the third trigger, the potential route trigger?

A: Staff was able to address this trigger only by asking each recipient of its initial and second data requests if they were aware of any dedicated transport routes that might meet the conditions for the third trigger. Staff received no positive responses except from SBC.

Q: Is there anything else you would like to bring to the attention of the court?

A: No.

Q: Does this conclude your testimony?

A: Yes, however, Staff reserves the right to supplement this testimony.

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Redacted Pursuant to Protective Order in Cause No. PUD 200300646

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